

Case No. 48394-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SHANTANU NERAVETLA, M.D.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH, MEDICAL
QUALITY ASSURANCE COMMISSION,

Respondent.

AMICUS CURIAE BRIEF

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I. INTRODUCTION AND INTEREST OF AMICUS

Founded in 1916, the Legal Aid Society – Employment Law Center (LAS-ELC) is a public interest legal organization has represented, and continues to represent, clients faced with discrimination on the basis of their disabilities, including those with claims brought under the Americans with Disabilities Act and corresponding state laws. The LAS-ELC frequently files amicus briefs in cases of importance to persons with disabilities.

Federal and state disability non-discrimination laws, specifically Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and Washington’s Law Against Discrimination, were intended to cover a broad range of disabilities and to ensure that persons with disabilities are full and equal members of our society. To achieve this goal, Congress and the Washington State Legislature fashioned statutes designed to protect not only those persons who have impairments that give rise to specific physical and mental limitations but also those persons have experienced such limitations in the past or who—like Dr. Neravetla—are regarded as having a disability by others. In creating these groundbreaking laws, Congress and the Washington State Legislature recognized that the irrational fears and misperceptions about disability can be as debilitating as the impairments themselves and included within the

broad class of persons are those—like Dr. Neravetla—who were discriminated against because of the “prejudice, stereotype of unfounded fear” of others.

The Medical Quality Assurance Commission perceived and ultimately held that hearsay and unsubstantiated allegations of Dr. Neravetla’s conduct constituted a “mental condition” that “if it persist[ed], would impede his ability to practice with reasonable skill and safety.” AR 1610. Rather than analyze Dr. Neravetla’s ability to practice with reasonable skill and safety, the Medical Quality Assurance Commission conflated Dr. Neravetla’s alleged conduct with the existence of a mental condition and permitted its subjective perceptions to stand in for the rigorous scrutiny and objective criteria required to prevent unjust discrimination.

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II. ARGUMENT

A. Federal and State Disability Non-Discrimination Laws

Prohibit Adverse Actions Based on a Perceived Disability.

1. Section 504 First Granted Protection for People “Regarded As” Having a Disability.

In 1973, for the first time in American history, federal law extended civil rights protection to people with disabilities through the enactment of Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (Sept. 26, 1973), codified at 29 U.S.C. § 701, et seq. Section 504 recognized disability as its own protected category and prohibited discrimination on the basis of disability in programs receiving federal funds. *Id.* at 87 Stat. 355.

In 1974, Congress amended the Rehabilitation Act to include in the definition of disability “any person who (A) has a physical or mental impairment which substantially limits one or more major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.” S. Rep. No. 93-1297, at 37-38, 63 (1974).

[This] new [three-pronged] definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority.

S. Rep. No. 93-1297, at 39; *see also* 120 Cong. Rec. 30,531, 30,534 (1974) (statement of Sen. Cranston).

In 1987, the United States Supreme Court first interpreted the “regarded as” prong of Section 504. In *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court found that, by “includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired[,] ... Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.” *Arline*, 480 U.S. at 284.

2. The Americans with Disabilities Act Protects People

“Regarded As” Having a Disability.

The Americans with Disabilities Act (ADA), which was signed into law on July 26, 1990, extended Section 504’s protections for people with disabilities beyond federally-funded programs and into the private sector. It also incorporated almost verbatim Section 504’s definition of “individual with a disability,” including its “regarded as” prong.¹ In doing

¹ The ADA incorporates Section 504’s definition of a person with a disability by using the three pronged approach to eligibility. The term “disability,” with respect to an individual, is defined as (1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(1); 29 U.S.C. § 706(8)(B).

so, the ADA made clear Congress's intent to continue combating the effects of society's "myths, fears and stereotypes" of disability. H.R. Rep. No. 101-485, pt. 3 at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451-53;² *see E.E.O.C. v. United Parcel Serv., Inc.*, 306 F.3d 794, 803 (9th Cir. 2002), *opinion amended on denial of reh'g*, 311 F.3d 1132 (9th Cir. 2002) ("[P]eople should not be rejected on account of myths or stereotypes."); *see also* 1 EEOC Technical Assistance Manual § 2.2(a), *reprinted in* ADA Manual (BNA) § 90:0512 (1992) ("The legislative history of the ADA indicates that Congress intended [the regarded-as] part of the definition to protect people from a range of discriminatory actions based on 'myths, fears and stereotypes' about disability, which occur even when a person does not have a substantially limiting impairment.").

Despite Congressional intent, in 1999, the Supreme Court's narrow interpretation of the ADA's definition of disability in *Sutton v. United Air Lines, Inc.* virtually eliminated the protection of the "regarded as" prong.

² 42 U.S.C. § 12201(a) ("[N]othing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973."); *Bragdon v. Abbott*, 524 U.S. 624, 644-46 (1998) (holding that Congress is presumed to know the state of the law when it passes legislation, and its use of terms that have been previously construed indicates an intent to ratify such interpretations). Congress expressly endorsed the reasoning of *Arline* in all three major committee reports. H.R. REP. NO. 101-485, pt. 2, at 53 (1990); H.R. REP. NO. 101-485, pt. 3, at 30 (1990); S. REP. NO. 101-116, at 23 (1989).

527 U.S. 471 (1999).³ In *Sutton*, the Court required plaintiffs to show that their employers not only subjectively regarded them as impaired and were substantially limited in a major life activity but also that these same employers subjectively regarded those limitations as disqualifying for a “broad range of jobs.” *Id.* at 491. The *Sutton* decision spurred Congress to step in to counteract the effect of the Court’s restrictive interpretation of the definition of disability and broaden coverage.

3. The ADA Amendments Act Restored Protections for Individuals “Regarded As” Having a Disability.

In 2008, Congress passed the Americans with Disabilities Amendments Act (ADAAA), Pub.L. 110–325, §§ 4(a) & 8, 122 Stat. 3555 (2008). The ADAAA redefined the “regarded as” prong of the definition of disability, reaffirming that “stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society” continue to negatively affect persons with disabilities and, in many ways, “are just as disabling as the actual impact of an impairment.”⁴

³ “In line with the Supreme Court’s restrictive interpretation of the first prong of the definition ... the Court also ... restrictively construed prong three, increasing the burden of proof required to establish that one has been regarded as disabled.” H.R. Rep. No. 110-730 pt. 2, at 18.

⁴ In signing the ADA Amendments Act into law, President George H. Bush expressly stated that the law’s purpose was, in part, “to reject the Supreme Court’s reasoning in

Under the ADAAA's expansive definition of disability,

[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subject to an action prohibited under this Act because of an actual or perceived physical impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S.C.A. § 12102(3); *Hilton v. Wright*, 673 F.3d 120, 128–29

(2d Cir. 2012) (discussing section 12102(3)(A)); see *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014), *cert. denied sub nom. Weaving v. City of Hillsboro, Or.*, 135 S. Ct. 1500 (2015) (quoting 42 U.S.C.A. § 12102(4)(A) (“The definition of disability ... shall be construed in favor of broad coverage of individuals ..., to the maximum extent permitted by [its] terms....”)).

4. The Washington Law Against Discrimination is Broader than the ADA and Protects People Regarded As Having a Disability.

In 2006, Washington's highest court adopted the ADA definition of disability. *McClarty v. Totem Elec.*, 157 Wash. 2d 214, 228 (2006) (“We have concluded that the use of the term disability has evolved to the point that its definition in the federal statute and in Washington's should

Sutton ... with regard to coverage under the third [regarded as] prong of the definition of disability and to reinstate ... a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.” ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(3) (2008).

be the same.”) (internal quotation marks omitted). In response to *McClarty*, the Washington Legislature passed Substitute Senate Bill 5340 (SSB 5340) to clarify the definition of disability and reiterate the broad scope of protection. *See* 2007 Wash. Legis. Serv. Ch. 317 (SSB 5340). As expressly stated in Section 1 of SSB 5340:

[t]he legislature finds that the supreme court, in its opinion in *McClarty* ..., failed to recognize that the Law Against Discrimination [WLAD] affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990....

Id.; *see also* Washington Governor’s Message, 5/4/2007 (“Governor Gregoire ... signed into law a measure that defines disability within the Washington law against discrimination. The bill restores the anti-discrimination protections put at risk by the Supreme Court decision in *McClarty v. Totem Electric* and makes it clear that people with disabilities will continue to enjoy equal rights and privileges in Washington.”).

The Washington Law Against Discrimination (WLAD) defines disability as “the presence of a sensory, mental, or physical impairment that: (i) is medically cognizable or diagnosable; or (ii) exists as a record or history; or (iii) *is perceived to exist whether or not it exists in fact*. RCW 49.60.040(7) (emphasis added). While very little case law interprets

“perceived disability” claims,⁵ the Washington State Legislature intended the provisions of the WLAD to be construed liberally. *See* RCW 49.60.020 (“[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.”); *Kries v. WA-SPOK Primary Care, LLC*, 190 Wash. App. 98, 136 (2015) (citing *Arline*, 480 U.S. at 278, n. 2.) (“[p]rohibitions against disability discrimination seek to rid the workplace of negative attitudes and practices toward the disabled.”).

In forgoing the application of objective criteria to its determination that Dr. Neravetla had a “mental condition” that rendered him unable to practice with reasonable skill and safety under RCW 18.130.170, the Medical Quality Assurance Commission (MQAC) demonstrated that it regarded Dr. Neravetla as having a mental disability based on the very negative attitudes, myths, and stereotypes associated with mental disabilities that federal and state non-discrimination laws seek to prohibit.⁶

⁵ *Clype v. Commercial Driver Servs., Inc.*, 189 Wash. App. 776, 794 (2015), *review denied*, 185 Wash. 2d 1017 (2016) (noting that “case law about perceived disability claims in Washington is very sparse.”)

⁶ *See* Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 Geo. L.J. 399, 401 (2006) (“[M]ore than ten years after the [ADA] expressly prohibited private employers from discriminating on the basis of mental, as well as physical, disabilities, most people would still likely prefer not to have a coworker or employee with a mental illness.”); *see also* Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 Nw. U. L. Rev. 1351, 1363, 1364 (2008) (stating that “[i]ndividuals with psycho-social disabilities historically have been among the most excluded members of society[,]” and “[r]esearch firmly establishes that people

B. The Medical Quality Assurance Commission's Broad Interpretation of "Mental Condition" Regards Dr. Neravetla as an Individual with a Disability.

The MQAC's decision relies on prejudice and stereotypes to find Dr. Neravetla unqualified to practice medicine. Instead of focusing on Dr. Neravetla's ability to practice, the MQAC decision to sanction Dr. Neravetla turned on its perception that Dr. Neravetla's alleged conduct constituted a "mental condition" that "if it persist[ed], would impede his ability to practice with reasonable skill and safety." AR 1610.

1. RCW 18.130.170 Requires a Mental or Physical Condition.

Under Washington's Uniform Disciplinary Act, the MQAC is charged with regulating the practice of physicians in Washington and can sanction the licensee who is suffering from "any mental or physical condition" under RCW 18.130.170. Specifically, RCW 18.130.170 states:

[i]f the disciplining authority believes a license holder may be unable to practice with reasonable skill and safety to consumers by reason of any mental or physical condition, a statement of charges in the name of the disciplining authority shall be served on the license holder and notice shall also be issued providing an opportunity for a hearing. The hearing shall be limited to the sole issue of the capacity of the license holder to practice with reasonable skill and safety.

RCW 18.130.170(1).

with mental disabilities are subjected to greater prejudice than are people with physical disabilities").

The Washington Court of Appeals has defined the term “mental condition” in the context of criminal proceedings to mean a “mental abnormality,” “personality disorder,” or “mental disability” that is established by psychological diagnosis. *See, e.g., In re Det. Of Albrecht*, 129 Wash. App. 243, 250 (2005) (“mental condition” established by expert psychological testimony diagnosing defendant with a “mental abnormality” and “personality disorder”); *In re Det. Of Jacobson*, 120 Wash. App. 770, 781 (2004) (defendant’s “mental condition” ascertained by psychological diagnosis of various “mental abnormalities”); *State v. Despenza*, 38 Wash. App. 645, 648 (1984) (equating “mental condition” with “mental disability”). *Cf. Rothwell v. Nine Mile Falls Sch. Dist.*, 149 Wash. App. 771, 780 (2009) (using term “mental condition” interchangeably with “posttraumatic stress disorder”).

RCW 18.130.170(1) similarly expects that the mental condition be diagnosable by a certified health professional. *See, e.g.,* RCW 18.130.170(2)(a) (“the disciplining authority may require a license holder to submit to a mental or physical examination by one or more licensed or certified health professionals.”) and RCW 18.130.170(2)(c) (“the license holder may submit physical or mental examination reports from licensed or certified health professionals.”).

**2. Dr. Neravetla was Sanctioned Based on Subjective
Determinations of an Alleged “Occupational Problem”
Which Is Not a Mental Condition.**

In its Final Order, the MQAC found that Dr. Neravetla “suffer[ed] from an occupational problem,” which triggered the application of RCW 18.130.170(1). *See* AR 1610-11. Thus, the MQAC transformed an “occupational problem” into a “mental condition,” ignoring the fact that an occupational problem is not a diagnosable mental condition or disorder.

Significantly, although several certified health care providers testified at the hearing, not one of them diagnosed Dr. Neravetla with anything. *See* AR 1605. Further, the MQAC did not find that Dr. Neravetla actually engaged in any “disruptive behavior.” AR 1604. Instead, the MQAC concluded that Dr. Neravetla had an “occupational problem” based on expert testimony indicating that the “occupational problem” label was affixed to Dr. Neravetla because he was suspended and ultimately fired from his job, which does not constitute a medical diagnosis. AR 2320; AR 2323; AR 2320-21, ll 25-5; AR 2657.

Thus, there are no objective criteria for determining who falls under the MQAC’s definition of an “occupational problem.” This lack of objective criteria and the resulting uncertainty surrounding the determination of who has, or does not have, an “occupational problem”

leaves the ultimate determination to the discretion and subjective beliefs of the decisionmaker.

If an “occupational problem” can constitute a “mental condition,” all persons who allegedly engage in commonplace workplace behaviors, such as tardiness or having difficulty accepting constructive criticism, could be charged with a mental condition and sanctioned under the statute. “Mental condition” would be equated with a general cadre of everyday behaviors that could be characterized as disruptive and increase the potential for abuse for those in a position of power. *See e.g., Clark v. Columbia/HCA Info. Servs., Inc.*, 117 Nev. 468, 473, 479 (2001) (Nev. 2001) (holding that the “disruptive conduct” hospital relied upon in revoking physician’s privileges, which included sending reports and letters to outside doctors and regulatory agencies complaining about care and procedures used by the hospital and in-patient insurance policies, mirrored conduct protected by the Nevada whistleblowing law); *Rosner v. Eden Twp. Hosp. Dist.*, 58 Cal. 2d 592, 598 (1962) (reversing hospital’s exclusion of physician because of his inability “‘to get along with’ some doctors or hospital personnel” and finding that attendant interest of patient welfare outweighed disharmony that physician’s objections to hospital and physician treatment practices created).

**3. The MQAC's Ruling Permits Discrimination and Abuse By
Targeting Alleged Behaviors That Do Not Rise to the Level
of Professional Incompetence.**

The focus of the MQAC's inquiry should be whether the physician is competent to practice medicine with reasonable skill and safety. RCW 18.130.170(1) ("The hearing shall be limited to the sole issue of the capacity of the license holder to practice with reasonable skill and safety."). However, instead of gathering and analyzing evidence of Dr. Neravetla's ability to practice medicine, the MQAC improperly focused its attention on turning hearsay testimony about Dr. Neravetla's alleged conduct into a "mental condition." *See* AR 1604; AR 1610-11.

By conflating Dr. Neravetla's alleged behaviors and demeanor with the existence of a mental condition, the MQAC demonstrated that it regarded Dr. Neravetla as having a mental disability. Implicated in the MQAC's determination that Dr. Neravetla "suffered from" a mental condition are the very negative attitudes, fears and stereotypes associated with mental disabilities.⁷ AR 1607, n.4.

⁷ *See* Lorraine Schmall, *One Step Closer to Mental Health Parity*, 9 Nev. L.J. 646, 666–67 (2009) (explaining that stigma regarding mental disorders is based on misperceptions); Emens, *supra* at 416–17 (discussing common stereotypes about people with mental illness, including beliefs that they are unreliable and lazy).

The MQAC's interpretation of the term "mental condition" encourages disciplinary action against a health care provider based on subjective and erroneous perceptions of the provider's mental state, without regard to whether the provider lacks professional competence. *See Morgan v. PeaceHealth, Inc.*, 101 Wash. App. 750, 768 (2000) (noting the difference between "unprofessional conduct" and "technical proficiency of the physician" in a complaint against a physician) ; *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 68-69 (1991) (describing disruptive behavior as a "specific type of unprofessional conduct" and distinguishing it from "professional competence"); *Siegel v. St. Vincent Charity Hosp. & Health Ctr.*, 520 N.E.2d 249 (Ohio App. 1987) (drawing distinction between a pattern of disruptive and non-cooperative behavior and professional competence).

Without objective criteria to guide the determination of whether a physician has a "mental condition" that renders the physician incapable of practicing with reasonable skill and safety, any physician could be subject to sanctions based on a myriad of behaviors that could arbitrarily be branded "disruptive." AR 1610. Such an expansive definition of "mental conditions" opens the door to countless actions against physicians thereby increasing the number of charges brought before the MQAC and ultimately, this Court.

In deciding whether a physician is unable to practice with reasonable skill and safety because of a mental condition, the MQAC should base its analysis on the best available *objective evidence*. Such an objective assessment is critical in the context of individuals with perceived mental disabilities.

Too often, personal perceptions of acceptable risks and medical probabilities stand in for the rigorous scrutiny demanded by the ADA. Good, well-meaning people perceive and assess risks based on factors that have nothing to do with actual, scientific probabilities. Research shows that we fear the potential harm that is unfamiliar, uncontrollable, and highly publicized more than the one that is known, actually or apparently within our control, or below the media's radar screen

Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 Nw. U.L. Rev. 1279, 1281 (2001). Indeed, the strong fears and stereotypes associated with certain disabilities,⁸ were the very basis for developing these objective standards. Only by implementing objective criteria to guide the determination of whether a physician has a "mental condition" that renders the physician incapable of practicing with reasonable skill and safety, can the MQAC ensure that it prevents unfair

⁸ See Hubbard, *supra* at 1294 ("To counter exaggerated fears about employing persons with disabilities, Congress purposefully adopted a rigorous ... standard that harnesses science, medicine, and a fact-specific inquiry to assess actual, rather than perceived, threats to health and safety."); Emens, *supra* at 416-17.

and unnecessary discrimination by elevating facts over fear and medicine over myth.

CONCLUSION

The evidence in this record does not establish that Dr. Neravetla had a mental condition which falls under RCW 18.130.170. The MQAC's decision should be overturned and Dr. Neravetla's sanctions should be rescinded. Otherwise, common workplace behaviors will be mischaracterized as disruptive— as they have been here — and deemed far worse than they truly are, and the fears and stereotypes associated with mental disabilities will trump the critical mandates of disability nondiscrimination statutes.

LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER

A handwritten signature in cursive script, reading "Alexis Alvarez", written over a horizontal line.

By: Alexis Alvarez (Cal. Bar No. 281377)

DECLARATION OF SERVICE

Laura Faulstich states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by MacDonald Hogue & Bayless, and I make this declaration based on my personal knowledge and belief.

2. As local counsel for Legal Aid Society-Employment Law Center, on August 8, 2016, I caused to be delivered to:

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3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of August, 2016, at Seattle, King County,
Washington.

A handwritten signature in cursive script, reading "Laura Faulstich". The signature is written in dark ink and is positioned above a horizontal line.

Laura Faulstich
Legal Assistant

MACDONALD HOAGUE BAYLESS

August 08, 2016 - 2:29 PM

Transmittal Letter

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Case Name: Neravetla v. State of Washington, Dept of Health, Medical Quality Assurance Commission

Court of Appeals Case Number: 48394-7

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

☒ Brief: Amicus

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

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